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No. A-817

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RICHARD TURZAI,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LIQUOR CONTROL
BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA

Eileen D. Yacknin
Attorney for Petitioner
NEIGHBORHOOD LEGAL
SERVICES ASSOCIATION
1312 E. Carson Street
Pittsburgh, PA 15203
(412) 431-7255

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COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA LIQUOR CONTROL BOARD, Respondent.	)	No. A-817

PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE LIQUOR CONTROL BOARD'S NOTIFICATION OF THE PETITIONER'S DISCHARGE FROM EMPLOYMENT VIOLATED THE PETITIONER'S CONSTITUTIONALLY-GUARANTEED PROCEDURAL DUE PROCESS RIGHTS, WHERE THE WRITTEN NOTICE MERELY MIMICKED THE CONCLUSORY LANGUAGE OF THE "ENFORCEMENT OFFICERS HANDBOOK", WITHOUT CLEARLY STATING, IN A MANNER SUFFICIENT TO APPRISE THE EMPLOYEE, THE GROUNDS UPON WHICH THE DISCHARGE WAS BASED, IN VIOLATION OF THE PERTINENT PENNSYLVANIA REGULATION.

2. WHETHER THE PENNSYLVANIA CIVIL SERVICE COMMISSION'S REFUSAL TO PERMIT THE PETITIONER'S PRETRIAL DISCOVERY AND/OR THE ADMISSION AT TRIAL OF AN INTERNAL INVESTIGATIVE REPORT, IN WHICH IT WAS REVEALED THAT THE PETITIONER'S NAME HAD BEEN IMPROPERLY SUGGESTED BY A LIQUOR CONTROL BOARD INVESTIGATOR TO THE TWO KEY WITNESSES NECESSARY AND WHICH WAS ESSENTIAL TO THE LIQUOR CONTROL BOARD'S CASE AGAINST THE PETITIONER, UNCONSTITUTIONALLY DEPRIVED THE PETITIONER OF HIS DUE PROCESS RIGHTS TO FULL AND COMPLETE DISCOVERY AND OPPORTUNITY TO EFFECTIVELY CROSS-EXAMINE.

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OPINIONS BELOW

The majority Opinion of the Commonwealth Court of Pennsylvania in this case is set forth in Appendix A. The dissenting Opinion of the Commonwealth Court of Pennsylvania is set forth in Appendix B. The Opinions of the Commonwealth Court, decided on July 12, 1985, are reported at ___ Pa.C. ___, 495 A.2d 639 (Pa. Cmwlth. 1985).

The January 27, 1986 per curiam Order of the Pennsylvania Supreme Court, denying the Petitioner's Petition for Allowance of Appeal of the Order and Opinion of the Commonwealth Court is set forth, in letter form, as Appendix C.

The Adjudication and Order of the State Civil Service Commission, entered on February 23, 1984, is attached as Appendix D.

JURISDICTION

The Order of the Pennsylvania Supreme Court in this case was dated and entered on January 21, 1986. Petitioner moved this Honorable Court for an Extension of Time Within Which to File a Petition for a Writ of Certiorari, pursuant to 28 U.S.C. §2101(c). By Order dated April 25, 1986, Justice William J. Brennan, Jr. granted the Petitioner's Motion and extended the filing date until June 26, 1986. This Petition for a Writ of Certiorari has been filed within this period. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law....

The State regulatory provisions involved are Sections 105.3 and 105.14(b) of Volume 4 of the Pennsylvania Code, which are set forth in Appendices E and F.

STATEMENT OF THE CASE

Prior to his dismissal on August 12, 1983, the Petitioner, Richard Turzai, had been employed as an enforcement officer by the Pennsylvania Liquor Control Board ("LCB") for nearly 12 years. Throughout his years of service with the LCB, he maintained an excellent work record and developed a reputation as an honest, professional and hard-working enforcement agent. Notwithstanding Turzai's outstanding record, both the Pennsylvania Civil Service Commission and the Commonwealth Court of Pennsylvania affirmed his dismissal (on charges that he had "disclos[ed] confidential information" and reveal[ed] complaints or complainants" regarding an ongoing liquor licensee investigation "to an unauthorized person,"

despite the fact that (1) the LCB had not proved the existence of an ongoing investigation or that Turzai had any knowledge thereof; (2) neither the license nor his barmaid (the LCB's principal witnesses) were certain that they even knew Turzai; (3) the LCB did not prove any motive for Turzai's alleged actions; and (4) Turzai's name was suggested to the licensee by the LCB's investigating officer.

On August 5, 1983, Turzai received notice from the LCB that he had been removed from his position as an Enforcement Officer II effective August 12, 1983, based upon certain charges presented against him by LCB Officer Danyluk. The letter, attached as Appendix G, described the alleged charges as follows:

Conduct unbecoming an Enforcement Officer by virtue of your violations of the Manual of Instructions, Chapter 641-75 and Handbook for Enforcement Officers during or about the week of April 11, 1983 in Sabo's Cafe (R-7813).

1. Improper conduct while on or off duty.

2. Disclosing confidential information to unauthorized persons.

3. Revealing complaints or complainants to unauthorized persons.

On August 11, 1983, Turzai filed an appeal of his dismissal with the State Civil Service Commission ("Commission"). It was Turzai's contention throughout these proceedings that he was utterly unware of any ongoing LCB investigation of Sabo's Cafe, that he did not reveal confidential information to any

unauthorized persons, and that he was being set up for dismissal by his long time adversary, Officer Danyluk.

On August 29, 1983, Turzai filed Objections to the Statement of Charges and Notice of Removal, attached as Appendix H, on the grounds that the charges lacked the specificity required by 4 Pa. Code §105.3. Turzai also attempted to conduct pretrial discovery regarding the nature of the charges, and to obtain LCB documents which he contended would reveal certain improprieties by the LCB during its investigation of this matter. The State Civil Service Commission refused to allow pretrial discovery of the documents.

An adjudicatory hearing regarding Turzai's discharge was held before the Pennsylvania Civil Service Commission on October 25, 1983. Only one of three

Commissioners, Chairman Mary D. Barnes, presided at the hearing.

His previously-filed Objections to Statement of Charges and Notice of Removal having gone unheeded, Turzai renewed those Objections at the onset of the hearing.

The testimony elicited at the hearing disclosed that the licensee, Robert Sabo ("Sabo") was not at all sure that he knew Turzai; that Turzai was not a frequent visitor at his bar; and that Sabo was unsure whether Turzai had had any connection with the LCB. Sabo also testified that when he was approached by Officer Danyluk, it was Danyluk who suggested that Turzai was the informant. Sabo's response to Danyluk's suggestion was only that "it probably could be." Sabo further testified that the informant made no request for money or other consideration

in exchange for this confidential information allegedly revealed to him.

Officer Danyluk also testified on behalf of the LCB, regarding the results of his own investigation of Turzai's alleged disclosure of confidential information. Chairman Barnes, upon Turzai's request, did permit Turzai's counsel to quickly review---for the first time despite Turzai's earlier repeated efforts to obtain pre-trial discovery of this document--Danyluk's internal investigative report, for the purpose of cross-examining Danyluk at the hearing. Nevertheless, she denied Turzai's request that the report be entered as an exhibit in the Record.

There was nothing in the case presented by the LCB, even remotely, to suggest that Turzai had knowledge of the

Sabo investigation, or a motive for divulging this information. Turzai timely moved to dismiss the action at the close of the LCB's case for failure to establish a prima facie case. The Commission reserved ruling on the motion and ordered Turzai to proceed with his defense.

Rather, in its Adjudication and Order dated February 23, 1984, the Commission held that the LCB's Statement of Charges and Notice of Removal comported with constitutionally required due process requirements and was not defective. Moreover, the Commission denied Turzai's Motion for Dismissal, finding that the LCB had established a prima facie case. Finally, the Commission subsequently determined that Turzai had violated LCB policy by disclosing confidential

information, and upheld Turzai's discharge from employment.

Petitioner Turzai thereafter sought judicial review of the Commission's Adjudication and Order, in the Commonwealth Court of Pennsylvania--the tribunal which has original jurisdiction of appeals from state administrative agencies--raising, again, the numerous violations of the constitutionally-mandated procedural due process guarantees about which he now seeks this Honorable Court's review. In the Statement of Questions and in the Argument contained in his Brief before the Commonwealth Court, Turzai specifically contended that Turzai's due process rights were denied because the Notice of Removal lacked the requisite specificity and because the Commission had refused to permit the pre-trial discovery or admission

into the evidence of the investigation report which revealed that the LCB had improperly suggested Turzai's name as the wrongdoer to an essential witness. Appendix I. In its majority Opinion, the Commonwealth Court affirmed the Civil Service Commission's Adjudication and Order. The Honorable Jacob Kalish, in a five page dissent, agreed with Turzai that he had been denied due process by the LCB's and Civil Service Commission's actions.

Turzai thereafter timely filed a Petition for Allowance of Appeal for the Order of the Commonwealth Court. In his Petition, Turzai again specifically contended that he had been wrongfully deprived of his constitutionally-guaranteed due process rights, by virtue of the LCB's inadequately vague Notice of Removal

sent to him, and by the Commission's refusal to permit pretrial discovery of the internal investigating memorandum so critical to Turzai's case. See, Portions of Turzai's Petition in this regard, attached as Appendix J.

Thereafter, the Pennsylvania Supreme Court, per curiam, summarily denied Turzai's Petition for Allowance of Appeal.

REASONS RELIED UPON IN REQUESTING ISSUANCE OF THE WRIT

The decision of the Pennsylvania Civil Service Commission, as affirmed by the Pennsylvania Commonwealth Court, to uphold the termination of Turzai's employment with the LCB ended, in disgrace, Turzai's long and illustrious career with the LCB. Not only was Turzai suddenly cut off from his only source of income and future financial security, but the circumstances under which he was terminated have left a blight on his record which has made it very difficult for him to obtain suitable new employment. Before the state should be permitted to devastate the future of one of its nonprobationary employees, it must be required to follow the strict requirements of due process of law.

A review of the Record in this case demonstrates that, beginning with the

inadequate notice of the charges against him and continuing through the hearing before Commissioner Barnes, Turzai was not afforded a full and fair opportunity to be heard and to present his defenses, and the Commonwealth Court erred by refusing to overturn the Commission's Adjudication and Order. The Petitioner respectfully requests this Honorable Court to ensure that a citizen's good name and standing in his community, and his career and means of livelihood are not taken away from him by the state without first affording to him the full panoply of due process rights and privileges guaranteed by the United States Constitution.

A. The Constitutionally-Deficient Notice of Removal and Statement of Charges

The pertinent state regulations governing Civil Service Commission

procedures require that the mandatory Notice of Removal of a non-probationary employee contain "a clear statement of the reasons therefor, sufficient to apprise the employee of the grounds upon which the charges are based." 4 Pa. Code §105.3 (See, Appendix E). Defective notices may result in the reversal of the personnel action. Id.

This regulation, promulgated for "[t] purpose of ...satisfy[ing Constitutional] due process requirements by affording an affected employee reasonable notice of the charges against him so that he will have sufficient opportunity to answer the charges and fight his removal," Chavis v. Philadelphia County Board of Assistance, Department of Public Welfare, 29 Pa.Cmwlth. 205, 370 A.2d 445, 447 (1977), nevertheless fails to specifically

delineate the minimum criteria needed to successfully accomplish this goal. Consequently, the courts of Pennsylvania have interpreted this rule, in keeping with Constitutionally-warranted procedural due process principles, to require such sufficient certainty and particularity so as to enable an employee to prepare an adequate defense. Ibid. In Chavis, supra., the Commonwealth Court of Pennsylvania considered the constitutional adequacy of a Notice of Removal comparable to that at issue in the case at bar. There, an income maintenance worker for the Pennsylvania Department of Public Welfare was discharged for the following stated reasons:

> Falsification of official documents and records; concealment of material fact by ommission and without adequate justification; failure to be at work on tasks assigned; gross

> negligence resulting in monetary loss to Commonwealth and welfare recipients; neglect of duties; failure to comply with job instruction resulting in service delayed or not delivered; failure to observe the client's rights.

29 Pa. Cmwlth. at 208, 370 A.2d at 447.

The court, noting that the employee was involved in the monitoring of the various needs and shifting eligibilities of more than one hundred welfare clients, which job entailed a multitude of responsibilities both inside and outside the office, ibid., held that the information contained in the Notice of Removal failed to meet the degree of certainty and particularity necessary to adequately apprise the employee of the alleged deficiencies which prompted the discharge. The court observed:

> While a listing of specific incidents of an employee's behavior in the notice may

> be unnecessary, the reasons listed should at least refer specifically to those aspects of the employee's responsibility in which he was found deficient and should identify the deficiencies with much more particularity than was done here. Charges as general as these make adequate preparation of a defense difficult if not impossible and make a hearing of little use to an employee threatened with discharge. (emphasis added)
>
> 370 A.2d at 447-448

As in Chavis, Turzai's responsibilities were continuously varying and shifting, and required a multitude of activities both inside and outside the office. He was involved in monitoring from 50 to 75 cases at any given time, and was assigned numerous tasks including, inter alia, the investigation of complaints, court appearances, writing reports, and interviewing witnesses. In the context of Turzai's numerous and demanding

responsibilities, the LCB Notice of Removal was far too general to adequately enable Turzai to prepare a defense to the charges. Without setting forth the specifics of the nature, time or circumstances of the alleged misconduct, Turzai was simply unable to meet the false allegations and prove his innocence.

It is beyond dispute that the traditional concepts of procedural due process apply with full force to administrative proceedings, Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773 (1938), and that administrative agencies are bound by the requirements of procedural due process to give an adversely-affected individual prompt notice of the factual predicates of the government's case. See, e.g., Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 288, 95 S.Ct. 43, 443 n.4

(1974)("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that it may rebut it"); Hannah v. Larche, 363 U.S. 420, 442, 80 S.Ct. 1502, 1514 (1960)("[W]hen governmental agencies adjudicate to make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process"); Chicago, Milwaukee, St. Paul & P.R. Co. v. United States, 585 F.2d 254, 260 (7th Cir. 1978)("Fundamental fairness in administrative proceedings requires notice clearly informing a party of the proposed action and the basis for that action").

Numerous other federal courts have similarly held that the due process clause of the Constitution requires, at minimum, that the constitutionally-obligatory notice of reasons for the discharge of a nonprobationary employee entitled to such procedural due process, as was Turzai, "specify the charges against him in sufficient detail fairly to enable him to show any error that might exist," Clemons v. Dougherty County, GA., 684 F.2d 1365, 1374 (11th Cir. 1982), and cases cited therein.

In DiLuigi v. Kafkalas, 437 F.Supp. 863 (M.D. Pa. 1972) vacated on other grounds, 584 F.2d 22 (3rd Cir. 1978); cert. denied 440 U.S. 959, 99 S.Ct. 1500 (1979), a National Guard technician received notice that he was being discharged "because his demonstrated ability to cope with certain

responsibilities inherent in his position was unacceptable and his inability to grasp and maintain basic fundamentals required of his position." The federal district court concluded that such notice "constituted bureaucratic gobbledegook and gave [the plaintiff] only the vaguest idea of the reasons for his discharge. Without being given a detailed explaination in writing of the basis for his termination, DiLuigi lacked the ability to respond effectively..." 437 F.Supp. at 871. Ciging this Honorable Court's prescription in Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) that "[n]otice to be adequate must be given sufficiently before any hearing to permit the party being considered for termination an adequate opportunity to prepare a response," ibid., the DiLuigi court held that the notice was "totally inadequate"

and "violated the standards of due process required in [that] factual context." Ibid. Cf., Thurston v. Dekle, 531 F.2d 1264, 1271 (5th Cir. 1976); Muscare v. Quinn, 520 F.2d 1212, 1215 (7th Cir. 1975); Albert v. Chafee, 571 F.2d 1063, 1065-1066 (9th Cir. 1978); Velger v. Cawley, 525 F.2d 334, 336 (2nd Cir. 1975).

When compared and contrasted with the notices of discharge from employment complained of and considered by the foregoing various federal courts, the Notice afforded Turzai in the instant case cannot be deemed, by any stretch of the imagination, to comport with constitutional due process standards.

B. The Civil Service Commission's Unconstitutional Refusals to Permit Pretrial Discovery of the Investigative Report or to Admit the Report Into the Record

Prior to the hearing, it became known to Turzai that Officer Danyluk had prepared a detailed memorandum dated May 19, 1983, which summarized the investigation of Turzai's alleged misconduct. Turzai attempted to obtain pretrial discovery of this memorandum, which he contended would demonstrate that Danyluk improperly suggested Turzai's name to two of the LCB's key witnesses, that the investigation was conducted in an unfair and biased manner, and that the testimony of several witnesses presented by the LCB was subject to impeachment.

The LCB, recognizing the damaging nature of this evidence, strenuously objected to producing this memorandum on three separate occasions. (The LCB presented a Motion In Limini, a Motion for Protective Order to prevent Turzai's

review of the report, and it objected at the hearing to its introduction). The LCB argued that the memorandum contained the "mental impressions, conclusions and opinions of the Board's representatives respecting the value or merit of the claim or defense respecting the strategy or tactics concerning the above-captioned matter," and was, therefore, not discoverable under Rule 4003.3 of the Pennsylvania Rules of Civil Procedure.[1/]

[1/] Pa. R.Civ.P. 4003.3 pertinently provides:

> ...a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions,

(continued next page)

Additionally, the LCB argued that the document lacked sufficient relevancy to the issues involved in the current matter.

Commissioner Barnes indicated that, although the document was certainly relevant, it might contain confidential information which should not be made public. On this basis, despite the fact that she had not first examined the document and despite LCB's failure to object on this ground, Commissioner Barnes denied Turzai's pretrial discovery of this critical document.

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opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

It was not until the beginning of the cross-examination of Danyluk that Turzai's attorney was permitted to see the memorandum at issue. He was then granted only a few short minutes to review the document immediately prior to his cross-examination of Danyluk. It is evident from the few points that Turzai's counsel was able to make on cross--examination, that the memorandum did not contain any confidential information, and that it was highly relevant to Turzai's defense. The document not only revealed that Danyluk suggested to Sabo that Turzai was the informant, it also unequivocally revealed that both the LCB's two key witnesses were initially unwilling to offer any statement whatsoever to Danyluk about the incident, or the identity of the true informant. It was only after substantial

pressure from Danyluk, which Sabo admitted "shook him up," that he agreed to testify for the LCB. According to the May 19, 1983 memo, Sabo's bar maid adamantly refused to give any kind of statement to the LCB. Subsequently, she mysteriously changed her mind and testified in accordance with the LCB's version of events at the hearing.

Turzai thereafter offered this document into the evidence so that it would become a permanent part of the record and reviewable by the two commissioners who were not present at the hearing. This motion, too, was denied by Commissioner Barnes, this time on the ground that the document was cumulative. There was no mention at the time of the ruling that the document contained confidential information.

The Commission erred in refusing to

permit pretrial discovery of the memorandum, and by refusing to admit it into the Record. The document was described by counsel for the LCB as a summary of the investigation. Contrary to the LCB's assertions, it did not contain the mental impressions, conclusions or opinions of a representative of the LCB respecting the value or merit of its claim. As Commissioner Barnes recognized, the document was highly relevant. The document was clearly discoverable pursuant to the Pennsylvania Rules of Civil Procedure, and the refusal of the Commission to permit its discovery pretrial amounted to an unconstitutional deprivation of the Petitioner's due process guarantees.

As with the mandated notice specifying in detail the grounds upon which adverse

action affecting one's protected employment, the pretrial discovery of relevant evidence--including the production of documents--is prescribed by Constitutional due process strictions, to ensure that an adversely-affected party is afforded a full, fair and meaningful opportunity to respond to the hostile charges.

In McClelland v. Andrus, 606 F.2d 1278, 1285-1286 (D.C. Cir. 1979), the Court of Appeals held that "[i]n addition to being bound by those rules [adopted by some agencies provide for some form of discovery in their proceedings], the agency is bound to ensure that its procedures meet due process requirements. Withrow v. Larkin, 421 U.S. 35, 46, 95 S.Ct. 1456 (1975). Therefore, discovery must be granted if in the particular situation a refusal to do so would so

prejudice a party as to deny him due process. (citations omitted)(emphasis supplied)" See also, Standard Oil v. F.T.C., 475 F.Supp. 1261, 1275 (N.D. IN 1979):

> The essence of due process ...is the requirement of notice of the charges against the person and a fair opportunity to be heard before finally being deprived of life, liberty or property by the government.... (citations omitted). There can further be no doubt...that this due process requires that plaintiffs in the...administrative proceeding are entitled to appropriate discovery in time to reasonably and adequately prepare themselves, and their defenses, before facing the charges in the administrative "trial". See, e.g. Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773(1938)(emphasis supplied).

In the case at bar, the Honorable Senior Judge Kalish, in his dissent, recognized that the Petitioner's constitutionally-mandated due process

guarantees were not satisfied merely by permitting the Petitioner a limited opportunity to use the critical report solely for the purpose of cross-examination:

> To allow the report for the limited purpose of use in cross-examination of a witness, where a timely pretrial request has been made, does not comport with the history of the broad dimension of pretrial constitutional protection our courts have provided. Its denial pretrial chills the opportunity to know the claims of the opponent, frustrates an adequate opportunity for cross-examination and does not meet the requirement that due process discovery prior to trial shall be as full and complete as possible. Pretrial discovery is part of the truth-seeking process. When due process is denied, an adjudication is not valid. (citation omitted)
>
> 495 A.2d at 643-644

Before the Civil Service Commission can be deemed to have satisfied the

minimum requisites of due process, an appellant must be provided a fair opportunity for notice and cross-examination, and it must be clear that no effort has been made by the agency to conceal or suppress evidence favorable to a defendant. Norwood v. Pennsylvania State Horse Racing Commission, 16 Pa. Cmwlth. 219, 328 A.2d 198 (1974). By refusing to permit pretrial discovery of, and/or to admit an essential piece of evidence into the Record, the Commission committed an unconstitutional error of law by depriving the Petitioner of the procedural due process rights to which he was absolutely entitled.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to review the Order of the Commonwealth Court of Pennsylvania.

RESPECTFULLY SUBMITTED,

Eileen D. Yacknin
Attorney for Petitioner

NEIGHBORHOOD LEGAL
SERVICES ASSOCIATION
1312 E. Carson Street
Pittsburgh, PA 15203

(412) 431-7255

Date: June 25, 1986
Pittsburgh, Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RICHARD TURZAI, :

Petitioner, :

vs. : No. 758 C.D. 1984

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA LIQUOR CONTROL BOARD, :

Respondent.

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE MADALINE PALLADINO, Judge
HONORABLE JACOB KALISH, Senior Judge

Argued: March 14, 1985

OPINION BY JUDGE DOYLE FILED: July 12, 1985

This is an appeal by Richard Turzai (Appellant) from an adjudication and order of the State Civil Service Commission (Commission) sustaining his removal from

the position of Enforcement Officer II, regular status, by the Pennsylvania Liquor Control Board (Appointing Authority).

The Commission found that Appellant disclosed to Robert J. Sabo, the owner of Sabo's Cafe (Cafe), and to a barmaid employed there, that an investigation of the Cafe was being conducted by the Appointing Authority. The Commission further found that Appointing Authority policy prohibits the disclosure of confidential information and the revelation of complaints or complainnants to unauthorized persons. Accordingly, it determined that just cause existed for the removal of Appellant pursuant to Section 807 of the Civil Service Act (Act).[1]

Our scope of review of a Commission order is limited to determining whether

there has been a constitutional violation or an error of law and whether findings of fact are supported by substantial evidence on the record. Mufson v. Department of Public Welfare, 72 Pa. Commonwealth Ct. 404, 456 A.2d 736 (1983).

Appellant has raised numerous challenges to the Commission decision and we shall examine his contentions seriatim. First, Appellant maintains that the charges appearing in his removal letter were not sufficiently specific to afford him due process as mandated by Section 950 of the Act, 71 P.S. §741.950.[2] The removal letter stated in pertinent part that Appellant was being charged with "[c]onduct unbecoming an Enforcement Officer by virtue of your violations of the Manual of Instructions, Chapter 641-75 and Handbook of Enforcement Officers during

or about the week of April 11, 1983 in Sabo's Cafe (R-7813)." The letter further stated that the charges were (1) improper conduct while on or off duty (2) disclosing confidential information to unauthorized persons and (3) revealing complaints or complainants to unauthorized persons. The Commission, noting that the letter mentioned an approximate date and place, and included citations to the Appointing Authority manual and handbook, as well as statements of the policies allegedly violated, determined that it met the due process criteria for a personnel action letter as enunciated by this Court in Wood v. Department of Public Welfare, 49 Pa. Commonwealth Ct. 383, 411 A.2d 281 (1980). We agree. Appellant cites Chavis v. Philadelphia County Board of Assistance, 29 Pa.

Commonwealth Ct. 205, 370 A.2d 445 (1977), in which a notice relating to falsification of documents was found to be constitutionally infirm. But the letter in Chavis contained broad general allegations such as "concealment of a material fact by omission", "gross negligence", "neglect of duty", and "failure to comply with instructions." In the instant case, the charges as stated contain considerably more information than in Chavis and thus comprise a notice which would allow the employee to comprehend the nature of the charges and adequately prepare a defense. Wood. We therefore reject Appellant's assertion that his notice was inadequate.

Appellant next contends that the Appointing Authority's prima facie case is fatally defective because the Appointing Authority did not enter into evidence the

report pertaining to the substantive investigation of the Cafe and did not present proof that Appellant had access to or knowledge of the contents and date of that report. Appellant misses the point. The only issues before the Commission were whether there was an ongoing investigation of the Cafe and whether Appellant disclosed this fact. Examination of the personnel action letter clearly indicates that it is mere disclosure of the investigation which forms the basis of the charges upon which the removal is premised. The investigator himself testified that such an investigation was, in fact, in progress. The bar owner and barmaid testified that Appellant told them of the investigation. The Commission found this testimony credible. Thus, substantial evidence existed for the Commission's determination and any matters

contained in the report were mere surplusage unnecessary to establish just cause for removal.

Appeallant next contends that because Sabo testified that the tip-off occurred in May (rather than in April as the removal letter stated) the Appointing Authority failed to establish a prima facie case. Although the Appointing Authority did not present evidence that the infraction occurred in April, it did establish that Appellant revealed confidential information in the Cafe by revealing to Sabo and the barmaid that the Appointing Authority was investigating that establishment. Thus, the fact that Sabo could not recall the exact date of the incident is de minimis in light of the totality of his testimony. Sufficient facts as alleged in the removal letter

were proved to establish just cause based upon the stated charges.

Appellant argues next that the Commission denied him due process in that it refused to admit into evidence an Appointing Authority report which report revealed that Appellant's name had been suggested to Sabo as the tipster by the Appointing Authority employee conducting an investigation into the leak of the confidential information.[3] We do not agree with Appellant that due process was denied by the Commission's refusal to admit the report. The Commission, although it did refuse to admit the actual report, and, in fact, found it to be cumulative evidence,[4] did permit the report to be used for purposes of cross examination. Exclusion of cumulative evidence is not error. Rabenstein v. State Workmen's

Insurance Fund, 15 Pa. Commonwealth Ct. 160, 325 A.2d 681 (1974). Additionally, we decline to accept Appellant's suggestion which is, in essence, that the constitutional standards pertaining to witness identification of criminal suspects be applied to a Commission hearing. Commission proceedings clearly are not criminal in nature and we have rejected application of other criminal standards to Commission hearings in the past. See, e.g. Hughes v. State Civil Service Commission 17 Pa. Commonwealth Ct. 344, 331 A.2d 590 (1975) (Appointing Authority need not justify suspension or removal on a charge of theft of State property by proof beyond a reasonable doubt).

Appellant's next point of error is that the Commission failed to properly rule on his oral motion to dismiss for failure

to establish a prima facie case. This motion was made at hearing and ruling was deferred. Commission Regulation 105.15(b) 7, 4 Pa. Code §105.15(b)7, states that the Commission shall promptly rule on such motion. However, only one Commissioner, of three appointed,[5] was present at hearing. Implicit in the creation of the three member panel is the requirement that the substantive issue (in this case whether just cause existed) be decided by the Commission as a body. Where a majority of the Commission was not present to determine whether a prima facie case had been presented, the single member present was without power to express the view of the Commission as to whether a prima facie case had been established. Accordingly, the deferral on the motion was not only proper, but required.[6] Although no

express ruling was ever made on this motion to dismiss in the Commission's adjudication it was denied by implication and, thus, the Commission acted properly in considering all the evidence of record in reaching its decision.

Finally, Appellant maintains that several of the Commission's findings are not supported by substantial evidence. Our review of the record discloses that the findings are adequately supported. Based on the foregoing, the decision of the Commission is affirmed.

/s/
Joseph T. Doyle, Judge

FOOTNOTES

[1]Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §741.807.

[2]Section 950 was added by Section 27 of the Act of August 27, 1963, P.L. 1257.

[3]A careful review of the record reveals that Appellant's last name was suggested to Sabo only after Sabo mentioned Appellant's first name and indicated where Appellant lived. Sabo explained that he simply did not know Appellant's last name. We note that the Commission found Sabo's identification of Appellant at the hearing to be credible.

[4]Sabo admitted that Appellant's name had been suggested to him. See note 3 supra. Additionally, Commission Chairman Mary D. Barnes stated that such internal agency reports are usually regarded as confidential.

[5]Section 452 of The Administrative Code 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §162, creates the Commission and specifices that it "shall consist of three members."

[6]We do not hold that a single Commissioner is without power to rule on evidentiary questions and, indeed, Fleming v. State Civil Service Commission, 13 Pa. Commonwealth Ct. 421, 319 A.3d 185 (1974) and Siegel v. State Civil Service Commission, 9 Pa. Commonwealth Ct. 256, 305 A.2d 736 (1973), which hold that only a single

Commissioner need actually be present at a hearing, impliedly permit a single Commissioner to make such evidentiary rulings.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RICHARD TURZAI, Petitioner,	)	
vs.	)	No. 758 C.D. 1984
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA LIQUOR CONTROL BOARD, Respondent.	)	

O R D E R

NOW, July 12, 1985, the Adjudication and Order of the State Civil Service Commission, Appeal No. 4693, dated February 23, 1984, is hereby affirmed.

/s/
Joseph T. Doyle, Judge

CONCURRING AND DISSENTING
OPINION BY SENIOR JUDGE KALISH
Filed: July 12, 1985

The petitioner, Richard Turzai, has appealed from an adjudication of the State Civil Service Commission (Commission) affirming the decision of the Pennsylvania Liquor Control Board (PLCB) which removed him from his position as an enforcement officer. In a notice sent to him, he was charged with disclosing confidential information and revealing complaints to unauthorized persons. The notice contained the name of the cafe where the disclosures took place, the approximate time and the citations to relevant portions of the manual containing the violations.

Several weeks before the hearing, the petitioner sought discovery of certain documents in possession of the PLCB which, he alleged, would show that the investigation

improperly suggested his name. This pretrial discovery was refused; however, counsel was permitted its limited use on cross-examination of the investigator during the trial.

It is contended by the petitioner that he was denied due process in that 1) the notice was insufficient and that, 2) he was denied pretrial discovery.

Due process requires that the notice give the employee such information that he can discern the nature of the charges and prepare an adequate defense. Wood v. Department of Public Welfare, 49 Pa. Commonwealth Ct. 383, 411 A.2d 281 (1980). In the instant case, the notice met this requirement. It apprised him of the charges and of where and when the offense occurred, with citations to the relevant portions of the manual. While the notice

did not refer to specific incidents, an employee, from the information given, would be able to discern the nature of the charge and when and where it occurred. See Chavis v. Philadelphia County Board of Assistance, 29 Pa. Commonwealth Ct. 205, 370 A.2d 445 (1977).

I agree with the majority's view that under the circumstances of this case, a single commissioner had the power to dismiss the case.

Employment, in a non-probationary state position, is a property right and a person may not be deprived of the liberty to hold such a property right except by due process of law. Adler v. Montefiore Hospital of Western Pennsylvania, 453 Pa. 60, 311 A.2d 634 (1973). Where procedural due process is involved, the issue relates to the kind of process that is due.

Certain aspects of our legal procedure are regarded as our due. These aspects are a mixture of essential fairness and traditions in the law. Our past history and traditions are replete with examples of special considerations to a defendant in a criminal prosecution. The procedural aspect of Rule 305 of the Rules of Criminal Procedure, Pa.R.Crim.P. 305, makes mandatory, inter alia, the pretrial disclosure of the circumstances of the identification. The comment to this rule says it was disigned to provide adequate information to afford opportunity for effective cross-examination and to meet the requirements of due process discovery prior to trial shall be as full and free as possible.

In a civil action, Rule 4001 of the Rules of Civil Procedure, Pa. R.C.P. No. 4001, provides for discovery through the production of documents, and by depositions

and interrogatories, for the preparation for a trial of a case. Section 504 of the Administrative Agency Law, 2 Pa. C.S. §504, provides that no adjudication shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. Effective cross-examination is one of the great engines in the truth-seeking process. Thus, our legal history shows that the broadest dimensions of constitutional protection must be provided to the fact-finding process.

This Court is not deprived of the power to entertain claims challenging an agency's failure to afford a constitutional remedy. Department of Public Welfare v. Eisenberg, 499 Pa. 530, 538, 454 A.2d 513, 516 (1982) (concurring opinion of former Chief Justice Roberts). Thus, in Callahan

v. Pennsylvania State Police, 494 Pa. 461, 431 A.2d 946 (1981), our supreme court held that adjudicatory action cannot be taken validly by any tribunal, whether judicial or administrative, except upon a hearing wherein each party has an opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence on his own behalf and to make argument.

What we are concerned with here is not, as the majority states, the Commission's refusal to admit a report into evidence because it was cumulative; rather, the issue is the refusal of the Commission to allow pretrial discovery of a report in which the petitioner's name had been suggested as the tipster.

To allow the report for the limited purpose of use in cross-examination of a witness, where a timely pretrial request has been made, does not comport with the history of the broad dimension of pretrial constitutional protection our courts have provided. Its denial pretrial chills the opportunity to know the claims of the opponent, frustrates an adequate opportunity for cross-examination and does not meet the requirement that due process discovery prior to trial shall be as full and complete as possible. Pretrial discovery is part of the truth-seeking process. When due process is denied, an adjudication is not valid. Callahan.

I would reverse the action of the Civil Service Commission and remand the case to the Commission for a new hearing.

/s/
Jacob Kalish, Senior Judge

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE:	RICHARD TURZAI)	
	v. COMMONWEALTH)	
	OF PENNSYLVANIA,)	No. 548 W.D.
	LIQUOR CONTROL)	Allocatur Docket
	BOARD)	1985

ORDER ON PETITION FOR ALLOWANCE OF APPEAL

January 27, 1986; Petition Denied.

Per Curiam

APPENDIX C

COMMONWEALTH OF PENNSYLVANIA

RICHARD D. TURZAI, : State Civil Service Commission

v. :

Appeal No. 4693

PENNSYLVANIA LIQUOR CONTROL BOARD :

Ralph Ruggiero, Esquire
Attorney for Appellant

Eileen S. Maunus, Esquire
Attorney for Appointing Authority

ADJUDICATION

This is an appeal by Richard D. Turzai from removal from his position as Enforcement Officer II, regular status, by the Pennsylvania Liquor Control Board. A hearing was held October 25, 1983, in the State Office Building, Pittsburgh, Pennsylvania, before Chairman Mary D. Barnes, who presided.

FINDINGS OF FACT

1. By letter dated August 5, 1983, appellant was removed from his position as Enforcement Officer II, regular status, effective at the close of business, August 12, 1983, on charges of improper conduct, "disclosing confidential information to unauthorized persons" and "revealing complaints or complainants to unauthorized persons".

2. Appellant's appeal was properly raised before this Commission and was heard under Section 951(a) of the Civil Service Act.

3. On April 22, 1983, the appointing authority received a telephone call and was informed that Sabo's Cafe (Sabo's) had been tipped off to the fact that it was under investigation by the appointing authority; the caller further stated that

the owner and barmaid had been informed of the appointing authority's investigation.

4. The appointing authority, in checking its records, determined that there was, at that time, in fact, an investigation being conducted at Sabo's.

5. On May 2, 1983, two appointing authority employes visited Sabo's to ascertain whether the owner and barmaid did, in fact, know of the investigation.

6. The barmaid had been told by "Rich" that the bar was being investigated.

7. The owner of Sabo's had also talked to "Rich" who informed him that an investigation was being conducted by "Sam". The owner provided the appointing authority employes with a description of appellant and a location of appellant's residence.

8. An appointing authority employe named Sam was, in fact, conducting an investigation of the noted establishment.

9. At hearing, the owner and barmaid both identified appellant as the individual who tipped them off.

10. Appointing authority policy prohibits disclosing confidential information and revealing complaints or complainants to unauthorized persons.

The Notes of Testimony have been reviewed by all the Commissioners, together with the exhibits introduced at the hearing. We have also read the briefs submitted by both parties.

In the removal of a regular status employe, the burden is on the appointing authority to set forth a prima facie case of just cause for the personnel action. 71 P.S. §741.951(a), .807; 4 Pa. Code §105.15.

Before reaching the merits in this appeal, several preliminary matters demand attention. Appellant has first challenged the sufficiency of his notice as it appears in his removal letter. N.T. p. 11; Comm. Ex. A; Ap. brief, pp. 1-2, 10-11. The letter mentions an approximate date, the name Sabo's Cafe, and includes citations to the relevant appointing authority manual and handbook, as well as statements of the policies appellant is alleged to have violated. Commonwealth Court has stated "a removal notice need not be drafted with a certainty of a bill of indictment, but that due process does require that it be framed in a manner which enables an employee to discern the nature of the charges and adequately to prepare a defense." Wood v. Commonwealth of Pennsylvania, Department of Public

Welfare, Warren State Hospital, 49 Pa. Commonwealth Ct. 383, 386 (1980). It is our view that the personnel action letter here in question meets the criteria enunciated in Wood.

We next consider the motion for protective order and the motion in limine made by the appointing authority. Pennsylvania Rule of Civil Procedure 4012 provides that a protective order may be granted when "justice requires". Appellant seeks access to the appointing authority's investigative and disciplinary reports in order to establish the bias of certain appointing authority witnesses. N.T. p. 18. It is our view that where the actual witnesses are present for cross-examination and where the Commission allows the report to be used for purposes of cross-examination, the admission of the

reports themselves would merely constitute cumulative evidence and would not serve the ends of justice. Accordingly, the motion for protective order is granted only insofar as it relates to the admission of the actual documents into evidence. The motion is denied in all other respects.

With regard to the motion in limine, we note that technically such motion is not properly raised before an administrative body, the motion's purpose being to shield a jury from highly prejudicial information. See Black's Law Dictionary 914 (5th ed. 1979). We assume, however, that the motion was intended as a request to rule that the investigative reports are inadmissible. The subject matter of the motion in limine being the same as that of the protective order we, thus, based upon

the reasoning noted above, grant the motion insofar as it pertains to the admission of the documents themselves, and deny it in all other respects.

We now turn to an examination of the merits of the case. The appointing authority has presented the testimony of the owner of Sabo's Cafe (Sabo's) and the barmaid. Both these persons identified the appellant as the individual who alerted them to the fact that Sabo's was under investigation by the appointing authority. N.T. pp. 72-74, 88-90. Appellant contends that because these two witnesses did not accurately recall every minute detail of the incident, their credibility is to be discounted altogether. Ap. brief, pp. 12-13. It is our view, however, that these two witnesses were certain as to the identity of the individual who tipped

them off and, in fact, at hearing, they both credibly identified appellant as the person who had provided them with information pertaining to the identity of the investigator. N.T. pp. 72, 88. This credible evidence that appellant did disclose confidential information, thus violating the appointing authority's policy (N.T. pp. 58-59; AA Ex. 2), stands as strong support for our finding that just cause existed for the removal action.

Appellant contends that the appointing authority's case is fatally defective because the complaint which originally initiated the investigation of Sabo's was not entered into evidence. Ap. brief, pp. 2-3. This contention lacks merit for two reasons. First, testimony of the investigator assigned to the Sabo's complaint has indicated that he

was, in fact, engaged in said investigation during the period in question (N.T. p. 109); so long as an investigation was in progress, it has not been shown that the initiating document is relevant to our considerations. But even if this were not the case, the fact that appellant believed an investigation was underway and disclosed such information would, in our view, constitute acceptable evidence in support of the appointing authority's action.

Finally, we note that the record does contain some evidence of a personality conflict between appellant and his supervisor. N.T. p. 105. Even if this be the case, it is no defense to appellant's conduct which, at a minimum, inconvenienced the appointing authority by forcing it to transfer its investigation to another officer. N.T. p. 29.

Having found that appellant did violate appointing authority policy by disclosing confidential information we enter as

CONCLUSION OF LAW

Appellant was properly removed under Section 807 of the Civil Service Act, as amended.

ORDER

AND NOW, February 23, 1984, the State Civil Service Commission, by unanimous agreement of its three members, dismisses the appeal of Richard D. Turzai from removal from his position as Enforcement Officer II, regular status, and sustains the action of the Pennsylvania Liquor Control Board in the removal of Richard D. Turzai from his position as Enforcement

Officer II, regular status, effective

August 12, 1983.

State Civil Service
Commission

/s/
Mary D. Barnes
Chairman

4 Pennsylvania Code §105.3:

STATEMENT OF REASONS

Notices of removal, resignation by abandonment, involuntary retirement, involuntary demotion, or suspension issued to regular employes shall include a clear statement of the reasons therefor, sufficient to apprise the employe of the grounds upon which the charges are based. Notices determined to be defective may result in the reversal of the personnel action.

APPENDIX E

4 Pennsylvania Code §105.146:

DEPOSITIONS AND DISCOVERY

(a) Depositions. At the discretion of the Commission, depositions--statements of witnesses under oath--may be transcribed and submitted in lieu of testimony at the hearing, where the witness will be unavailable to testify at hearing because of unavoidable absence from the jurisdiction, illness, or other compelling reasons.

(b) Discovery of documents. At the discretion of the Commission, relevant documents may be obtained from an opposing party prior to the hearing.

(1) Requests for discovery of documents shall be in writing and shall initially be served upon the opposing party or legal representative in sufficient time to allow completion of discovery prior to the hearing.

(2) If the parties are unable to agree upon a reasonable scope of discovery, requests for discovery may then be forwarded in writing to the Commission, which may, in its discretion, issue appropriate subpoenas under this title.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LIQUOR CONTROL BOARD
Harrisburg, Pennsylvania 17124

August 5, 1983

CERTIFIED - RETURN RECEIPT REQUESTED

Mr. Richard Turzai
2313 Larkins Way
Pittsburgh, PA 15203

Dear Mr. Turzai:

At a meeting of the Pennsylvania Liquor Control Board held on Wednesday, August 3, 1983, consideration was given to certain charges which were presented against you, to wit:

> Conduct unbecoming an Enforcement Officer by virtue of your violations of the Manual of Instructions Chapter 641-75 and Handbook for Enforcement Officers during or about the week of April 11, 1983 in

Sabo's Cafe (R-7813).

1. Improper conduct while on or off duty.
2. Disclosing confidential information to unauthorized persons.
3. Revealing complaints or complainants to unauthorized persons.

It was the decision of the Board that:

> You be removed from your Enforcement Officer II position effective close of business August 12, 1983, which will be your last day of work.

Further, any one of the aforementioned charges in itself would have resulted in the decision by the Board of discharge.

This personnel action may be appealed by either of the following methods:

1) Appeal in writing to the Civil Service Commission, by completing the attached "Appeal Request" form.

2) File a grievance in accordance with the negotiated grievance procedure in the collective bargaining agreement, within 12 days of receipt of this letter. You may present a grievance with the assistance of the union representative, regardless of your union membership status. It is also your right to present such a

grievance without the intervention of the union.

Since you have more than ten (10) years creditable service with the Commonwealth, you may:

1) Apply for an annuity. In this event, please complete the front side of the enclosed Application for Retirement Allowance (RS-6), indicating which option you select.

-or-

2) Withdraw your retirement contribution in lump sum, in which case you should complete the five items checked in red on the Form OA-410, "Application for Return of Contributions",

and return it to this office for processing.

-or-

3) Vest your contribution. You may elect to leave your accumulated deductions in the fund until you reach superannuation age (age 60) and then apply for a retirement allowance. The advantage of vesting is that it eliminates any reduction in your annuity because of age. Should you decide to vest, complete the attached Application for Vesting (RS-6-V, Pink).

If you have any questions concerning your retirement options, please contact James Hanawalt, Northwest Office Building, Room 425-A, Harrisburg, PA 17124, 717-783 9850.

/s/
David E. Kerr
Executive Director
For:
Daniel W. Pennick
Chairman

Attachments

RKR/bb

IN RE: Appeal of Richard Turzai

OBJECTIONS TO STATEMENT

OF CHARGES AND NOTICE OF REMOVAL

To the Honorable Members of the Civil Service Commission:

AND NOW comes Richard Turzai by and through his attorney, Ralph J. Ruggiero, and files the following objections to the notice of removal dated August 5, 1983.

1. Richard Turzai is a regular civil service employee of the Pennsylvania Liquor Control Board.

2. On August 10, 1983, he received a notice of removal dated August 5, 1983 which is attached hereto as exhibit A.

3. On August 12, 1983, Richard Turzai timely appealed the removal and asked for a hearing on the appropriate form wherein he completely and absolutely

denied the allegations as not based on fact.

4. The notice of removal is defective and not in compliance with 4 Pennsylvania Code Section 105.3 in that it does not include a clear statement of the reasons for termination sufficient to apprise the employee of the grounds upon which the charges are based in that;

(a) With regard to charge one; Improper Conduct While on or Off Duty: The nature, time, or circumstance of the alleged improper conduct is not given.

(b) With regard to charge two; Disclosing Confidential Information to Unauthorized Persons: The nature, content, time, persons involved, in the alleged disclosure is not given with the required specificity.

(c) With regard to charge three; Revealing Complaints or Complainants to Unauthorized Persons: The nature, content, number of complaints or complainants involved, time, persons involved, in the alleged revelation is not given with the required specificity.

5. Richard Turzai nor his counsel can adequately prepare a defense to such ambiguously drawn charges.

WHEREFORE, the appellant, Richard Turzai prays that the honorable board dismiss the complaint against him, and reinstate him to his position with the Liquor Control Board with full back pay.

RESPECTFULLY SUBMITTED,

Ralph J. Ruggiero,
Esquire

STATEMENT OF THE QUESTIONS

FIRST QUESTION

WHETHER DISCHARGED EMPLOYEE WAS DENIED DUE PROCESS WHERE THE NOTICE OF REMOVAL LACKED SPECIFICITY?

ANSWERED IN THE NEGATIVE BELOW.

SECOND QUESTION

WHETHER THE APPOINTING AUTHORITY ESTABLISHED A PRIMA FACIE CASE AGAINST EMPLOYEE CHARGED WITH REVEALING AN ENFORCEMENT COMPLAINT WHERE THE APPOINTING AUTHORITY DID NOT PUT INTO EVIDENCE (1) A COPY OF THE ENFORCEMENT COMPLAINT (2) PROOF THAT THE EMPLOYEE HAD POSSESSION, KNOWLEDGE, OR ACCESS TO ENFORCEMENT COMPLAINT AND (3) THE CONTENTS AND DATE OF ISSUANCE OF ENFORCEMENT COMPLAINT?

QUESTION RAISED BUT NOT ANSWERED BELOW.

APPENDIX I

THIRD QUESTION

WHETHER THE LCB MADE OUT A PRIMA FACIE CASE WHERE ITS NOTICE OF REMOVAL ALLEGED THAT EMPLOYEE'S WRONG-DOING OCCURRED DURING THE WEEK OF APRIL 11 WHEREAS ALL THE TESTIMONY CONTRADICTS THIS AND SHOWS IT TO HAVE BEEN IMPOSSIBLE?

QUESTION RAISED BY NOT ANSWERED BELOW.

FOURTH QUESTION

DID COMMISSION ERR IN SUPPRESSING INTRODUCTION OF EVIDENCE BENEFICIAL TO EMPLOYEE?

ANSWERED IN THE NEGATIVE BELOW.

FIFTH QUESTION

WHETHER COMMISSION COMMITTED ERROR WHERE IT FAILED TO PROMPTLY RULE ON APPELLANT'S MOTION TO DISMISS?

QUESTION RAISED BUT NOT ANSWERED BELOW.

SIXTH QUESTION

WHETHER DISCHARGED EMPLOYEE WAS DENIED DUE PROCESS WHERE THE IDENTIFICATION TESTIMONY

OF THE CHIEF WITNESS AGAINST HIM WAS TAINTED BY IMPROPER SUGGESTION OF HIS IDENTITY BY EMPLOYER?

QUESTION RAISED BUT NOT ANSWERED BELOW.

SEVENTH QUESTION

WHETHER THE CIVIL SERVICE COMMISSION FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE?

ANSWERED IN AFFIRMATIVE BELOW.

SUMMARY OF THE ARGUMENT

FIRST POINT

THE STATEMENT OF CHARGES CONTAINED IN THE NOTICE OF REMOVAL DATED AUGUST 5, 1983 DOES NOT MEET THE SPECIFICITY REQUIREMENTS OF 4 PA. CODE §105.3

SECOND POINT

THERE IS NO PRIMA FACIE CASE TO SUPPORT THE TERMINATION OF AN EMPLOYEE CHARGED WITH REVEALING AN LCB ENFORCEMENT COMPLAINT TO AN UNAUTHORIZED PERSON WHERE THERE IS

NOT ENTERED INTO THE EVIDENTIARY RECORD (A) A COPY OF THE ALLEGED ENFORCEMENT COMPLAINT (B) TESTIMONY AS TO THE DATE OF ISSUANCE OR CONTENT OF THE COMPLAINT (C) TESTIMONY THAT THE ACCUSED EMPLOYEE HAD POSSESSION, KNOWLEDGE, OR ACCESS TO THE ALLEGED COMPLAINT.

THIRD POINT

THE LCB DID NOT MAKE OUT A PRIMA FACIE CASE AGAINST MR. TURZAI WHERE THE TESTIMONY OF ITS MAIN WITNESS SABO CONTRADICTS THE WRITTEN NOTICE OF DISMISSAL IN THAT THE NOTICE STATED THAT THE ALLEGED WRONG-DOING BY ITS EMPLOYEE OCCURRED ON OR ABOUT THE WEEK OF APRIL 11, 1983, WHEREAS SABO TESTIFIED IT OCCURRED TOWARDS THE LATTER PART OF MAY, 1983.

FOURTH POINT

THE CIVIL SERVICE BOARD ERRED IN REFUSING TO ADMIT INTO EVIDENCE LCB INVESTIGATORY

MEMORANDUM WHICH SHOWED THAT THE LCB HAD IMPERMISSABLY SUGGESTED EMPLOYEE'S NAME AS THE WRONG-DOER TO A WITNESS AND SHOWED UNFAIRNESS AND BIAS IN CONDUCTING INVESTIGATION ON THE PART OF THE LCB AGAINST TURZAI. SUCH A SUPPRESSION WAS A DENIAL OF DUE PROCESS.

FIFTH POINT

THE COMMISSION COMMITTED AN ERROR OF LAW WHERE IT FAILED TO PROMPTLY RULE ON APPELLANT'S MOTION TO DISMISS APPELLEE'S CASE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE.

SIXTH POINT

THE APPELLANT'S RIGHT TO DUE PROCESS WAS DENIED WHERE THE TESTIMONY OF THE CHIEF WITNESS AGAINST HIM WAS TAINTED BY IMPROPER CONDUCT OF APPOINTING AUTHORITY'S INVESTIGATOR WHO IMPERMISSABLY SUGGESTED APPELLANT'S NAME AS THE WRONG-DOER.

SEVENTH POINT

THE CIVIL SERVICE FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether the manner in which Turzai was notified of the charges against him violated his constitutional rights to due process, and whether the notice itself satisfied constitutional requirements?

2. Whether the Commonwealth Court erred in affirming the State Civil Service Commission's refusal to permit pretrial discovery of, or introduction into the record of, evidence critical to Turzai's appeal?

3. Whether the Commonwealth Court erred in affirming the State Civil Service Commission's failure to promptly rule on Turzai's motion to dismiss?

4. Whether the Commonwealth Court erred in finding that the State Civil Service Commission's findings of fact are supported by substantial evidence?

CERTIFICATE OF SERVICE

The undersigned hereby certifies that 3 true and correct copies of the foregoing Petition for Writ of Certiorari were served upon Respondent by mailing the same by first class mail, postage prepaid, on the date indicated below to its counsel:

Eileen S. Maunus
Pennsylvania Liquor Control Board
407 Northwest Office Bldg.
Harrisburg, PA 17124

Date: August 5, 1996

Eileen D. Yacknin
Attorney for Petitioner

86-190

No. A-817

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

RICHARD TURZAI,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA LIQUOR CONTROL BOARD,
Respondent

On Petition for Writ of Certiorari From the Opinion and Order of the Commonwealth Court of Pennsylvania.

RESPONDENT'S BRIEF IN OPPOSITION

EILEEN S. MAUNUS
Assistant Counsel
Counsel for Respondent

Pennsylvania Liquor Control Board
406 Northwest Office Building
Harrisburg, PA 17124-0001
(717) 783-9454

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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1. Was the notice provided to the Petitioner advising him of the location, nature and date of the offense, sufficient to apprise Petitioner and assure that his due process rights were protected?

2. Did the Pennsylvania Civil Service Commission ruling to prohibit the admission of an investigative report which was utilized by the Petitioner for impeachment of the author of the document on cross-examination constitute reversible error, in light of the fact that the document constituted cumulative evidence?

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COUNTER-STATEMENT OF THE CASE

On April 22, 1983, Jaroslew Danyluk (Danyluk), Enforcement Assistant Supervisor of the Pennsylvania Liquor Control Board (LCB), received an anonymous telephone call indicating that Sabo's Cafe had been tipped off concerning an investigation.

Danyluk and Assistant Supervisor J. L. Herron (Herron) were assigned by Supervisor Robert Berg (Berg) to investigate the matter. Danyluk testified that at that time an enforcement investigation at Sabo's Cafe was being conducted by Enforcement Officer Sam Cangey (Cangey). Berg also indicated that he was responsible for making investigative assignments of liquor licensed establishments.

On May 2, 1983, Danyluk and Herron entered Sabo's Cafe and interviewed Elaine Russell (Russell), a barmaid at the Cafe. Russell stated that she was approached by "Rich" sometime during the week of April 11, 1983. She knew that "Rich" was an LCB agent. Prior to Russell's description of Richard Turzai (Turzai), Danyluk did not know the identity of the informer. Russell indicated that she freely gave information to Danyluk and she also knew Turzai independent of any suggestion of his last name by Danyluk. She independently identified "Rich" by pointing him out at the Pennsylvania Civil Service Commission (Commission) hearing.

Turzai informed Russell that an investigation was being conducted at Sabo's Cafe and that she should apprise

Robert Sabo, (Sabo) owner of Sabo's Cafe, of the investigation.

Approximately four (4) days later, Sabo was informed directly by Turzai of the investigation. Turzai told Sabo that he had seen an investigative report and it "was something to do with selling to minors . . . and some sort of lottery. . . ." During Sabo's interview with Danyluk, he indicated that he not only knew about the investigation, but Turzai also told him the first name of the investigator, (Sam) and provided a physical description of the investigating officer. The physical characteristics described by Sabo fit the description of Cangey. Sabo indicated that the investigating officer Cangey had dark hair, greying at the sides, wore glasses and lived in Monroeville.

Sabo provided Danyluk and Herron with the informer's height, weight, name ("Rich") and the area in which the informer resided (South Side). Only after receiving this information did Danyluk suggest the last name, Turzai. Sabo replied, "That's him, that's correct." Sabo independently identified Turzai as the informer at the Commission hearing. Sabo indicated that he freely gave information to Danyluk and Herron.

Cangey was removed from the assignment of investigating liquor law violations at Sabo's Cafe prior to its completion. Another officer was assigned, for Cangey could not effectively complete the investigation since his identity was revealed.

Berg indicated that Turzai was informed of the charges against him verbally prior to receipt of notice. He was told the name of his accuser, Sabo; informed about the specific incident, Sabo's was tipped off concerning a

complaint; and the date of the incident. This information was provided again to Turzai in his removal letter.

During the course of the hearing, Turzai sought to admit a document prepared by Danyluk regarding his investigation. This hearsay evidence was excluded; however, it was utilized by Turzai during cross-examination in an attempt to impeach Danyluk, the preparer of the document.

By Order dated February 23, 1984, the Commission found that there was just cause for the LCB's removal of Turzai from his position as an Enforcement Officer II. No bias was found in Danyluk's investigation and the LCB's witnesses were found to be credible. Thereafter, the matter was appealed to the Commonwealth Court of Pennsylvania who considered the issues raised before your Honorable Court on Petition for Writ of Certiorari. Again, it was found that Turzai was dismissed for just cause and his appeal was dismissed. On January 27, 1986, Turzai's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied.

REASONS FOR DENYING WRIT

The Commission found that the LCB proved by a preponderance of the evidence that Turzai was terminated for just cause. The Commission was sensitive to the need to protect undercover officers who are jeopardized by disclosure of an investigation by a fellow officer. It was not the LCB who placed Turzai's position in peril; rather it was Turzai's own misconduct which brought about his dismissal and subsequent disrepute.

The decision which is subject to this Petition does not warrant consideration by this Court for several reasons. First, the decision is manifestly correct based on credibility of witnesses and findings of fact. Second, the decision is consistent with prior decisions. Third, the decision turns upon its own facts and will not effect subsequent adjudications.

a. The Notice of Violation provided to Petitioner was sufficient under state law and met due process requirements.

> The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved the demands of due process are fulfilled.
>
> *Anderson National Bank v. Luckett,* 321 U.S. 233, 246.

Both the Commission and the Commonwealth Court of Pennsylvania, upon review, found that Turzai received adequate notice of the charges against him in order to prepare a defense. This conclusion was consistent with *Wood v. Commonwealth of Pennsylvania, Department Public Welfare,* 49 Pa. Commonwealth Ct. 383, 411 A.2d 281 (1980), which held that a "removal notice need not be drafted with the certainty of a bill of indictment, but that due process does require that it be framed in a manner which enables the employe to discern the nature of the charges and adequately prepare a defense." *Benjamin, Aplnt. v. Commonwealth of Pennsylvania, State Civil Service Commission,* 17 Pa. Commonwealth Ct. 427, 332 A.2d 585 (1975). Unlike the removal notice in the instant matter, the removal notice that was found insufficient in *Wood,* supra, simply stated that the employe was being removed for "continued, unsatisfactory work performance." In *Chavis v. Philadelphia County Board of Assistance, Department of Public Welfare,* 29 Pa. Commonwealth Ct. 205, 370 A.2d 445 (1977), the Commonwealth Court of Pennsylvania found that the notice provided was insufficient as it contained broad allegations such as "concealment of a material fact by omission," "gross negligence," "neglect of duty," and "failure to comply with instructions."

In the matter herein, it was found that Turzai was sufficiently apprised of the charges against him, consistent with the requirements outlined in the aforementioned prior decisions. His removal notice of August 5, 1983 was not broad or general. It contained specific charges against him, i.e. where the disclosure of confidential information occurred, the time period of the incident and the provisions of the Manual of Instruction which he violated. The

testimony also established that Turzai was informed verbally by his supervisor prior to the receipt of the official removal notice of the name of his accuser, the nature of the violation and the date of the incident.

Turzai was so well apprised of the charges against him that after he received the removal notice, and prior to the Commission hearing, he attempted to intimidate witness Sabo by going to his house on a Sunday. He showed Sabo the removal notice and informed him that he was being discharged for disclosing confidential information. Turzai sought to compel Sabo to disregard a subpoena for if Sabo didn't appear at the Commission hearing to testify, then nothing would happen to Turzai. The notice provided to Turzai and Turzai's conduct clearly indicated to the Commission and the Commonwealth Court of Pennsylvania that Turzai was more than sufficiently apprised of the charges against him, thereby satisfying the requirements of Due Process.

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b. The Pennsylvania Civil Service Commission did not commit reversible error and deny Petitioner his due process rights when it limited the use of an investigative report at the hearing.

Procedural due process in administrative proceedings is generally recognized to be a matter of greater flexibility than when dealing with strictly judicial tribunals. *Lacoumastic Corporation v. Parker,* 64 F.Supp. 138 (1944); *Mackatunas v. Finch,* 301 F.Supp. 1289 (1969). Turzai contends that he was denied due process of law when the Commission limited the use of an investigative report pre-

pared by Danyluk. Commission Chairwoman Barnes stated:

> I would suggest that you [Turzai] could use the report. We don't normally put investigative reports in full, in the record simply because there is a certain confidentiality of information between the people being investigated and our records are public.

We prefer to get that evidence some other way.

Turzai's counsel thereafter requested a copy of the report "so that he could properly cross-examine Mr. Danyluk as to what happened in that investigation." The Commission allowed the report to be used, "for the purpose of cross-examination where it would vary from the testimony of the witnesses themselves." Turzai had full access and unfettered use of the document for cross-examination at the Commission's hearing. He utilized all portions of the document which he felt were "damaging to the Commonwealth's case." Introduction of the document would have served no legal purpose besides reiterating that which was elicited from the witness who prepared the document.

In *Kubit v. Russ,* 287 Pa. Superior Ct. 28, 429 A.2d 703 (1981) and *Pittsburgh National Bank v. Mutual Life Insurance Company of New York,* 273 Pa. Superior Ct. 592, 417 A.2d 1206 (1980), the Court indicated that "error in excluding evidence is harmless if excluded evidence would have repeated evidence that was otherwise admitted." Moreover, the Court in *Flynn, Appellant v. City of Chester,* 429 Pa. 170, 239 A.2d 322 (1968), held that the "refusal to admit defendant's deposition offered by plaintiff was harmless error in view of the fact that plaintiff had been able to call defendant on cross-examination and question her as fully as desired and that plain-

tiff was permitted to use the deposition to impeach. Pa. R.C.P. 4020[a]."

Proof of denial of due process requires a showing of substantial prejudice. *Ka Fung Chan v. I.N.S.*, 634 F.2d 248 (1981). Turzai must show substantial prejudice by the Commission's denial to admit the investigative report. Turzai, who reviewed the document, failed to show that admission of the document would have altered the decision of the Commission. Quite the opposite was demonstrated, for Turzai's purpose in utilizing the document was to attack the credibility of its maker, which Turzai attempted to do on cross-examination. The Commission weighed the evidence elicited on cross-examination and found that Turzai failed to discredit the investigator or the investigation. Thus, Turzai failed to demonstrate undue prejudice with respect to his inability to introduce this document into evidence.

Turzai failed to demonstrate that he was unable to prepare a defense as a result of not receiving the document prior to the time of hearing. There was no assertion that witnesses other than the maker of the document were necessary in order for Turzai to prepare a defense.

The discovery provided Turzai was found to be adequate by both the Commission and the Commonwealth Court of Pennsylvania. Turzai alleged that the investigation conducted by Danyluk was biased and that his last name was suggested to the witnesses. The Commission found, after Turzai's extensive cross-examination of the investigator, that no bias was shown. All witnesses indicated that they were willing to talk to the investigator, but did not want to give a *written* statement. These witnesses further indicated that they were subpoenaed to

appear at the Commission hearing and Turzai unlawfully disclosed an investigation of a liquor licensed establishment. Turzai was identified as the informer by the witness at the Commission hearing.

The Commission found the LCB's witness to be credible and the rulings on the admission of the investigative report did not constitute reversible error which is consistent with prior decisions.

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c. The Petition does not present a federal question of significance.

The Pennsylvania Supreme Court has declined to hear the discretionary appeal of this matter, applying a procedural rule expressly modeled on United States Supreme Court Rule 19 and employing similar considerations. Rule 114 Pa. R.A.P. provides that an appeal is "not a matter of right, but of sound, judicial discretion and an appeal will be allowed only when there are special and important reasons therefor." The issue in this case is whether Turzai was provided with notice consistent with Due Process State Requirements and whether Turzai was able to defend against the charges. The Commission determined that the Petitioner was discharged for just cause and all requirements were met. This decision was affirmed by the Commonwealth Court of Pennsylvania.

CONCLUSION

Wherefore, based on the foregoing, Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,
(s) EILEEN S. MAUNUS
Assistant Counsel

Pennsylvania Liquor Control Board
406 Northwest Office Building
Harrisburg, PA 17124-0001
(717) 783-9454